

4-20-2016

## State v. Smith Respondent's Brief Dckt. 43218

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 43218
Plaintiff-Respondent,	)	
	)	Bonner County Case No.
v.	)	CR-2015-73
	)	
DEREK L. SMITH,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Smith failed to establish the district court abused its discretion, either by imposing a unified sentence of five years, with two years fixed, upon his guilty plea to aggravated assault, or by denying his Rule 35 motion for a reduction of sentence?

Smith Has Failed To Establish The District Court Abused Its Sentencing Discretion

Pursuant to a plea agreement, Smith pled guilty to aggravated assault, the state agreed “not to exceed a recommendation of a Retained Jurisdiction” and to recommend the sentence in this case run concurrently with Smith’s sentences in two separate cases, “any remaining sentencing considerations” were left open, and Smith waived his

right to appeal his conviction and sentence as long as the district court did not exceed “the term of actual incarceration.” (R., pp.53-54, 64.) At sentencing, the state recommended the retained jurisdiction program and a unified sentence of five years, with three years fixed. (4/20/15 Tr., p.13, Ls.10-12, 21-22.) The district court imposed a unified sentence of five years, with only two years fixed, and ordered it to run concurrently with Smith’s sentences in his two other cases. (R., pp.71-74.) Smith filed a notice of appeal timely from the judgment of conviction. (R., pp.84-86.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (R., pp.76-81, 87-90.)

Smith asserts his sentence is excessive in light of his substance abuse, willingness to participate in treatment, purported remorse, and because his daughter motivates him. (Appellant’s Brief, pp.3-4.) Smith’s appeal from the judgment of conviction should be dismissed because he specifically waived his right to appeal his sentence when he entered into the plea agreement.

The waiver of the right to appeal as a component of a plea agreement is valid and will be enforced if it was made voluntarily, knowingly, and intelligently. State v. Murphy, 125 Idaho 456, 872 P.2d 719 (1994).

Pursuant to the plea agreement, signed by Smith, Smith waived his right to appeal his conviction and sentence “except to the extent the *term of actual incarceration* or the fine is greater than is recommended herein.” (R., p.64 (emphasis added).) As part of the plea agreement, the state agreed to recommend the retained jurisdiction program; however, the state was free to recommend whatever term of incarceration it wished, as “any remaining sentencing considerations” were left “[o]pen.” (R., p.64.)

The plea agreement also included a provision wherein Smith agreed he was waiving his right to appeal his conviction and sentence knowingly and voluntarily. (R., p.64.) At the guilty plea hearing, the district court reviewed the plea agreement on the record, after which Smith advised he wished to “go forward with the written plea of guilty,” and the court subsequently determined Smith had entered his plea knowingly, voluntarily, and intelligently. (2/20/15 Tr., p.7, L.17 – p.9, L.15.) Smith has not challenged that determination on appeal. At sentencing, the state recommended the retained jurisdiction program and a unified sentence of five years, with three years fixed. (4/20/15 Tr., p.13, Ls.10-12, 21-22.) The district court imposed a unified sentence of five years, with only two years fixed. (R., pp.71-74.) Because the district court did not exceed “the term of actual incarceration,” Smith did not retain his right to appeal. To allow an appellate challenge in these circumstances would allow Smith to evade the appeal waiver in his plea agreement. Because Smith specifically waived his right to appeal his sentence, he cannot challenge his sentence on appeal and his claim on appeal should be dismissed.

Even if Smith did not waive his right to appeal his sentence, he has still failed to establish his sentence is excessive. The length of a sentence is reviewed under an abuse of discretion standard considering the defendant’s entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant’s probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of

demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)).

To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for aggravated assault is five years. I.C. § 18-906. The district court imposed a unified sentence of five years, with two years fixed, which falls well within the statutory guidelines. (R., pp.71-74.) At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Smith's sentence. (4/20/15 Tr., p.16, L.1 – p.18, L.12.) The state submits Smith has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Smith next asserts the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence. (Appellant's Brief, p.5.) In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed a Rule 35 motion "does not function as an appeal of a sentence." The Court noted where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule

35 motion.” Id. Absent the presentation of new evidence, “[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence.” Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Rule 35 functions to allow a defendant to request leniency in light of “new or additional” information *that was not available* at the time of sentencing. The only “new” information Smith provided in support of his Rule 35 motion, filed just *four days* after sentencing, was his unverified claim that his mother is dying of cancer. (R., p.77.) Smith’s mother’s illness does not merit a reduction of Smith’s sentence. In its order denying Smith’s Rule 35 motion, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for denying Smith’s motion. (R., pp.87-90 (Appendix B).) The state submits Smith has failed to establish an abuse of discretion, for reasons more fully set forth in the district court’s Order Denying Rule 35 Sentence Reduction and Notice of Right to Appeal, which the state adopts as its argument on appeal. (Appendix B.)

### Conclusion

The state respectfully requests this Court to dismiss Smith’s appeal from the judgment of conviction because he waived his right to appeal his sentence, and to affirm the district court’s order denying Smith’s Rule 35 motion for a reduction of sentence.

DATED this 20th day of April, 2016.

/s/  
JESSICA M. LORELLO  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of April, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

MAYA P. WALDRON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ \_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

## APPENDIX A



13

1 THE COURT: Do you want to say anything else  
2 in addition to your statement?

3 A. No, ma'am.

4 THE COURT: Okay. Comments, recommendations.

5 MR. GREENBANK: Your Honor, first, the State  
6 would request to be given 60 days within which to  
7 establish restitution in the case. So counsel and I  
8 can certainly at least talk about it and set it for  
9 hearing if we can't come to agreement on the issue.

10 The State's recommendation in this case is for  
11 an underlying sentence of three fixed, plus two  
12 indeterminate, for a unified sentence of five years.  
13 We base that on the extent of the criminal history and  
14 the PSI is -- as a whole.

15 I understand, based on counsel's reference --  
16 Ms. Williams referencing Pastor Tim's program, I do  
17 note that on Page 27 of the PSI in the recommendations  
18 portion it starts out, "Clearly this defendant is not  
19 suited for probation with community based treatment."  
20 And I believe that that's borne out in the PSI itself.  
21 The State is recommending retained jurisdiction in this  
22 case. I believe it carries with it the degree of  
23 punishment necessary, in light of the seriousness of  
24 the charges, as well as hopefully set him on a path of  
25 law abiding behavior. I don't know that it'll work but

15

1 -- he be allowed to have an opportunity to complete the  
2 Good Samaritan program.

3 THE COURT: Mr. Smith, would you like to make  
4 a statement to the Court on your own behalf?

5 A. Your Honor, I want to make apologies to my  
6 victims for what I put them through for my behavior.  
7 That was uncalled for. And I regret it everyday,  
8 especially that my daughter had to sit through it. I  
9 never -- I did not go there with those intentions. I  
10 am sorry that I acted that way. It was not right  
11 whatsoever. I've asked God for forgiveness on it. Now  
12 I just need to hopefully get the forgiveness of the  
13 victims sometime down the road. I know that's not  
14 gonna come immediately. I know I traumatized them.  
15 Your Honor, I just -- I'm asking that you  
16 please let me try Pastor Tim's program. I know that --  
17 I know that I can do good. I know I can. I've done  
18 good on probation for awhile before.

19 Thank you for hearing me out.

20 THE COURT: You're welcome.

21 Mr. Taylor or Ms. Williams, for the record, any  
22 legal, factual or equitable reason not to impose  
23 sentence?

24 MS. WILLIAMS: No, Your Honor.

25 MR. TAYLOR: No, Your Honor.

14

1 this is probably his last chance if the Court can --  
2 imposes the retained jurisdiction.

3 We ask for the imposition of standard fines and  
4 costs in addition. That's all I have.

5 THE COURT: Mr. Taylor, comments,  
6 recommendations.

7 MR. TAYLOR: Thank you, Your Honor.

8 Well, Your Honor, as the Court's aware,  
9 Mr. Smith has a lengthy history. This would be his  
10 third Rider. He is, according to his calculations,  
11 been in custody 107 days. What hasn't been tried is  
12 Pastor Tim's program. There's been fairly good success  
13 with the Good Samaritan program. They're apparently  
14 here today in the courtroom which leads me to believe  
15 they would not have driven up here unless they are  
16 willing to take him from the jail to the program in  
17 Hayden. He does have a job waiting for him at The  
18 Hills Resort. It's part-time. It could become  
19 full-time. Right now, of course he's in custody. He  
20 has to work at the part-time position for awhile before  
21 they will transition him into full-time.

22 Your Honor, I think that the Good Samaritan  
23 program is perhaps something that we haven't tried that  
24 could be beneficial. He's done the TC Rider. I don't  
25 know what the other Rider was. So I ask that the -- we

16

1 THE COURT: Mr. Smith, I spent sometime on  
2 your cases because I'm not only dealing with two new  
3 felonies but you have the two Kootenai County cases so  
4 I want to go back and review those.

5 You're 26 years old; is that right?

6 A. Yes, Your Honor.

7 THE COURT: So in -- and you had a  
8 substantial juvenile record as well. But your first --  
9 first felony was a delivery charge back in 2010 and the  
10 judge retained jurisdiction on that case. So you went  
11 on your first Rider, you came back, got on probation.  
12 You had your first probation violation in  
13 October of 2010. A second probation violation was  
14 filed. You were sent on a second retained jurisdiction  
15 program, came out, placed back on probation. Then we  
16 have another probation violation and that was a new  
17 case, that was the new felony, the 2012 case, a  
18 stalking case. And it looks like you did 180 days of  
19 local jail and then were placed on probation in those  
20 cases.

21 And at this point you are in that case. And  
22 this is your fourth probation violation, the new felony  
23 here, your second probation violation on the stalking  
24 case. And the -- when the Court looked at the new  
25 case, it's a burglary, you were hiding in an attic of

17

1 someone's house, the police had to come in and they  
2 found you, pulled you out of insulation, you were  
3 resistant to the police, you were under the influence.

4 It appeared that you were basically homeless at  
5 that time. That was on November 4th of 2014. And  
6 somehow you posted a \$10,000.00 bond, got out on  
7 November 19th. And on January 6, so less than two  
8 months later, you've got a new aggravated assault  
9 charge with your child present where you attacked the  
10 mother of your child and the person she was with in  
11 front of your child.

12 So, Mr. Smith, in this case, I can't just let  
13 you back into the community. I can't put you in that  
14 -- in Pastor Tim's program. It's a good program.  
15 There's a lot of success. But in this case we've got  
16 victims, we've got the stalking cases, we've got a  
17 burglary in somebody's house, going through their  
18 things. You were -- I read it said you thought the  
19 people were gone, the guy was in jail. So you break  
20 into his house, you're destroying the house, police  
21 come, you're hiding up in the attic, drug out. And  
22 then you commit another crime where you attack the  
23 mother of your child and her significant other and  
24 they've had significant trauma from that.

25 So given your record, I don't see any -- in

19

1 MR. TAYLOR: Yeah.

2 THE COURT: He probably has a little bit  
3 more. I'll take -- I'll take a look at that. Let's  
4 see. He's -- he has an additional five days. He was  
5 arrested on 11/4 and bonded -- excuse me, an additional  
6 15 days. Bonded on 11/19. So 107. That would be 122  
7 days credit on the burglary case.

8 I'm not -- I won't impose a fine. Well, let me  
9 see. Can we -- I guess I can't pull up the Kootenai  
10 County cases to see what you owe. It seemed like in  
11 reading the PSI, I believe you still owe a lot of  
12 money. Let's take a look. Find the financial. He  
13 currently owes over \$5,000.00 in unpaid fines so you  
14 have in restitution and then \$900.00 behind on costs of  
15 supervision so I'm not going to impose additional  
16 fines. You have not done well on probation, you  
17 haven't met your obligations.

18 The burglary, I'll just impose the court costs  
19 \$245.50. And there was not a request for restitution  
20 at this point.

21 On the aggravated assault: Two years fixed,  
22 three years indeterminate, for a unified sentence of  
23 five years. Credit for 107 days served. Sixty days  
24 for -- to file a restitution request, a stipulation, or  
25 request a hearing.

18

1 doing two Riders, I think we're at imposition time.  
2 And I don't do that lightly but undue risk of another  
3 crime are the factors I look at. I think you're in  
4 need of treatment that can be most effectively provided  
5 by an institution. I think a lesser sentence  
6 depreciates the seriousness of these two new felonies.  
7 You're still on probation on two other felonies. I  
8 think in this case you need some punishment and I need  
9 deterrence to other people that you can't just keep  
10 committing these crimes, violating people. You are a  
11 multiple offender. People were harmed by your conduct.  
12 There's no justification.

13 So in your cases I am going to impose your  
14 sentence in the two probation violation cases. And on  
15 the burglary case, I'm going to -- the State  
16 recommended one year fixed, two years indeterminate, a  
17 unified sentence of three years. I'll follow that  
18 recommendation but I'm not going to retain  
19 jurisdiction. I am going to impose sentence.

20 I will give you credit. It sounds like you  
21 have 107 days credit. Mr. Taylor, do you think that's  
22 on both cases?

23 MR. TAYLOR: I know that's in the ag assault  
24 case.

25 THE COURT: The 2015 case.

20

1 The court costs in that case are also \$245.50.  
2 I won't impose again a fine, given the fact that you'll  
3 be going to prison and you owe so much already. And  
4 you may owe restitution. I'm just going to impose  
5 court costs.

6 All right. I will need some time to prepare  
7 judgments. I can get the two judgments done in the  
8 Bonner County cases and then we'll have to do the  
9 Kootenai County judgments and we'll get them.

10 MR. GREENBANK: Is there any public defense  
11 reimbursement or not?

12 MR. TAYLOR: I ask the Court to waive that,  
13 Your Honor.

14 THE COURT: I think I'm going to waive that  
15 with the restitution over five thousand. I think we're  
16 getting Mr. Smith into a hole he'll never get out of.

17 Mr. Smith, I hope that you'll take this  
18 seriously, that you'll get the therapeutic community at  
19 some point in your imprisonment, get the treatment that  
20 you need and make the changes in your life that you've  
21 got to make. And we'll go off the record. The two  
22 sentences are concurrent.

23 (HEARING CONCLUDED.)  
24  
25

## APPENDIX B

2015-04-20-05

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

**STATE OF IDAHO,**

**Plaintiff,**

**vs.**

**DEREK LOREN SMITH,**

**Defendant.**

**CASE NO. CR-2015-0000073**

**ORDER DENYING RULE 35  
SENTENCE REDUCTION**

**AND  
NOTICE OF RIGHT  
TO APPEAL**

**I. INTRODUCTION**

On February 20, 2015, Defendant Derek Loren Smith, entered a plea of guilty to the crime of Aggravated Assault, a felony in violation of Idaho Code §§ 18-901 and 18-905. Smith appeared before the Court for sentencing on April 20, 2015, and the Court entered a Felony Judgment, sentencing Smith to the custody of the Idaho State Board of Correction to be incarcerated for a total unified sentence not to exceed five (5) years, commencing with a fixed term of two (2) years, to be followed by an additional three (3) years indeterminate, to be served concurrently with the sentence imposed for felony burglary in Bonner County Case No. CR-2014-0006934.. He received credit for one hundred and seven (107) days served in presentence confinement.

Smith's sentencing was held contemporaneously with probation violation hearings for his two Kootenai County, Idaho, criminal cases.

On April 28, 2015, Smith filed a Motion for Correction or Reduction of Sentence - I.C.R.

**ORDER DENYING RULE 35 SENTENCE REDUCTION - 1**

**087**

35, requesting that the Court reduce the unified sentence of five (5) years imposed on April 20, 2015. Smith is asking to be sent on a therapeutic community rider instead of being sent straight to prison, so that he can get help with his drug problem, and become more involved in his daughter's life, and also, be there for his mother, whom he claims is dying of cancer. He acknowledges that the sentence is fair, but wants one last chance to prove that he can follow the law.

## **II. IDAHO CRIMINAL RULE 35**

Pursuant to Rule 35 of the Idaho Criminal Rules, a motion to modify a sentence is to be considered and determined by the court without the admission of additional testimony and without oral argument unless otherwise ordered by the court in its discretion. Such a motion must be made within one hundred and twenty (120) days after the filing of a judgment of conviction, within one hundred and twenty (120) days after the court releases retained jurisdiction, or within fourteen (14) days after the filing of an order revoking probation. Smith's Rule 35 motion was filed on April 28, 2015, which was within one hundred and twenty (120) days after the filing of the judgment of conviction on April 20, 2015. Therefore, the motion is timely.

A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006). Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). If the sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of the additional information presented with the motion for reduction. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007); *State v. Fuhrman*, 137 Idaho 741, 746, 52 P.3d 886, 891 (Ct. App. 2002). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary

**ORDER DENYING RULE 35 SENTENCE REDUCTION - 2**

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objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case.” *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Bearing these standards in mind, the Court has reviewed and considered Smith’s Rule 35 motion and the court record. It is evident from Smith’s multiple probation violations and commission of a new felony (in this case) while he was out on probation, that he is either unable or unwilling to adhere to the terms and conditions of probation or to the laws of this State. Smith is a multiple and repeat offender. Therefore, in order to protect society, as well as achieve a measure of retribution and serve as a deterrent to other probationers in the community, the Court finds that it is necessary that Smith serve the sentence imposed in this case.

Considering these circumstances, and assuming the truth of the assertions in his Rule 35 motion, Smith has not shown that the sentence was excessive when pronounced. Accordingly, after reviewing the motion for any new information not available at the time of sentencing, the Court finds that the sentence is not excessive. The motion is denied.

### **III. CONCLUSION AND ORDER**

NOW, THEREFORE, for the reasons set forth, IT IS HEREBY ORDERED that Smith’s Motion for Correction or Reduction of Sentence - I.C.R. 35 is DENIED.

### **NOTICE OF RIGHT TO APPEAL**

YOU ARE HEREBY NOTIFIED that you have a right to appeal this Order to the Idaho Supreme Court. Any notice of appeal must be filed not later than forty-two (42) days after the entry of the written Order in this matter.

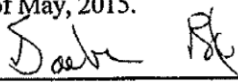
YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal,

**ORDER DENYING RULE 35 SENTENCE REDUCTION - 3**

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you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

DATED this 1 day of May, 2015.

  
\_\_\_\_\_  
Barbara Buchanan  
District Judge

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, or sent by electronic mail, or delivered via Courthouse Mail, this 1 day of May, 2015, to:

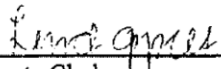
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\_\_\_\_\_  
Deputy Clerk

ORDER DENYING RULE 35 SENTENCE REDUCTION - 4

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